No. 42570-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Allan Simmons,

Appellant.

Thurston County Superior Court Cause No. 09-1-00693-1

The Honorable Judge Anne Hirsch

Appellant's Reply Brief

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ARGUMENT

I. MR. SIMMONS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel's mistakes resulted in a higher offender score and a longer standard range.

In the absence of a stipulation, the prosecution is required to prove the existence and comparability of any out-of-state convictions. In the absence of such proof, foreign convictions may not be used to determine the offender score and standard range. RCW 9.94A.500; RCW 9.94A.525; *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999).

Here, trial counsel's errors allowed the court to find an Illinois assault conviction comparable to second-degree assault, adding two points to Mr. Simmons's offender score. Had counsel not made these mistakes, Mr. Simmons would have been sentenced with an offender score of one. Accordingly, defense counsel provided ineffective assistance at sentencing. *See State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

Counsel twice stipulated that the Illinois conviction was comparable to second-degree assault. CP 112; RP 4, 6. This was a mistake, because the two offenses are not legally comparable and the state could not prove factual comparability under the rules established by the

Supreme Court.[1] *See* Appellant's Opening Brief, pp. 8-11 (citing *In re Pers. Restraint of Lavery,* 154 Wash.2d 249, 255, 111 P.3d 837 (2005) and *State v. Thiefault,* 160 Wash.2d 409, 158 P.3d 580 (2007)).

In addition, Counsel erroneously agreed to an offender score of three. RP 6. This, too, was error; had counsel argued in favor of an offender score of one, the prosecution would not have been able to prove the comparability of the Illinois conviction.

Finally, counsel allowed his client to participate in a PSI interview, in which Mr. Simmons acknowledged that the Illinois assault had resulted in a broken jaw. CP 96-106. This, too, was a mistake; it provided the prosecution with evidence that otherwise would have been unavailable to prove the comparability of the Illinois conviction.[2] Counsel should have refused to allow his client to be interviewed.[3]

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[1] As noted below, defense counsel unreasonably allowed Mr. Simmons to provide a statement which, when considered along with the state's proof, could have been used to prove comparability.

[2] Furthermore, as noted in the Opening Brief, Mr. Simmons committed "sentencing suicide" (*In re Carter*, 848 A.2d 281, 296 (Vt.,2004)) by continuing to deny the offense despite the verdict, by failing to show any remorse, and by failing to show any understanding of the crime's impact. CP 96-106; RP 13. *See* Appellant's Opening Brief, pp. 3-5, 12-15.

[3] In the alternative, counsel could have attended the interview and vetted his client's written submission, or objected to the court's consideration of statements obtained during the interview.

Counsel's errors prejudiced Mr. Simmons by adding two points to his offender score and thereby increasing his standard range from 103-136 months to 120-160 months. RCW 9.94A.510 and .515. Mr. Simmons was denied his right to the effective assistance of counsel; his sentence must be vacated and the case remanded for resentencing with an offender score of one. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010); *Lavery, at* 258.

B. The Court of Appeals should review Mr. Simmons's ineffective assistance claim.

Respondent erroneously contends that defense counsel's errors may not be reviewed. Brief of Respondent, pp. 5-9 (citing, *inter alia,* 2.5(c)(1)). This is incorrect for several reasons. First, RAP 1.2(a) requires that the rules of appellate procedure be "liberally interpreted to promote justice and facilitate the decision of cases on the merits."

Second, RAP 2.5(c)(1) expands a reviewing court's authority by codifying an exception to the "law of the case" doctrine.[4] It does not limit the appellate court's authority or otherwise prohibit review, as Respondent contends. Although RAP 2.5(c)(1) "does not revive automatically every

[4] If the rule did not exist, the doctrine would prohibit review of all issues that could have been raised in an earlier appeal.

issue or decision which was not raised in an earlier appeal,"[5] the Supreme Court has never held that an appellate court is barred from reviewing such issues.

Third, under RAP 2.5(a), the Court of Appeals has discretion to review any issue, whether or not it is appealable as a matter of right. *State v. Russell*, 171 Wash. 2d 118, 122, 249 P.3d 604 (2011).

Fourth, the Supreme Court has long applied a lenient standard to allow "belated challenges" to sentencing errors. *State v. Mendoza*, 165 Wash. 2d 913, 920, 205 P.3d 113 (2009). This practice "'tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.'" *Ford*, *at* 478 (quoting *State v. Paine,* 69 Wash.App. 873, 884, 850 P.2d 1369 (1993)); *see also In re Carrier*, 272 P.3d 209 (2012) ("Imposition of an unlawful sentence is a fundamental defect").

Fifth, principles of judicial economy weigh in favor of permitting Mr. Simmons to raise the issue in this appeal. If the Court refuses to review the claimed errors, Mr. Simmons will have the option of seeking collateral review, resulting in additional proceedings. Refusing to review

[5] *State v. Barberio*, 121 Wash. 2d 48, 50, 846 P.2d 519 (1993).

the issue now will not save scarce judicial resources; instead, it will have the opposite effect.

C. The issue is not controlled by *Franklin,* because the relevant statutes have been amended since *Franklin* was decided.

Respondent erroneously suggests that the comparability issue at the heart of this case is controlled by *State v. Franklin*, 46 Wash. App. 84, 87, 729 P.2d 70, 72 (1986) *rev'd and remanded sub nom. State v. Dunaway*, 109 Wash. 2d 207, 743 P.2d 1237 (1987) *supplemented,* 109 Wash. 2d 207, 749 P.2d 160 (1988). *See* Brief of Respondent, p. 12 ("Simmons's argument seems to ignore the Court of Appeals' decision in *Franklin*..."). This is incorrect.

The *Franklin* court found the Illinois statute comparable to a definition of second degree assault that has since been repealed. *See Franklin, at* 87 (citing former RCW 9A.36.020 (1986)).[6] At the time *Franklin* was decided, the statute defining second-degree assault required proof of "grievous bodily harm;" the current statute refers to "substantial bodily harm." *Compare* former RCW 9A.36.020 (1986) *with* RCW

[6] The repealed section declared that a person is guilty of second-degree assault when s/he "knowingly inflict[s] grievous bodily harm upon another with or without a weapon."

9A.36.021.[7] Thus the 1986 statute was comparable with the Illinois definition; the 2005 statute was not.

Furthermore, the *Franklin* court analyzed the Illinois statute under an SRA provision that has since been amended. At the time *Franklin* was decided, former RCW 9.94A.360 (1986) provided that "The designation of out-of-state convictions shall be covered by the offense definitions and sentences provided by Washington law." By contrast RCW 9.94A.525 provides that "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." In addition to the amendment of the statute, the Supreme Court and Courts of Appeal have developed a significant body of law has developed addressing comparability questions since 1986. The *Franklin* court did not have the benefit of those decisions.

Accordingly, *Franklin* does not control the comparability issue. Defense counsel should have advocated for an offender score of one.

II. THE SENTENCING COURT'S FINDING REGARDING MR. SIMMONS'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Mr. Simmons rests on the argument set forth in the Opening Brief.

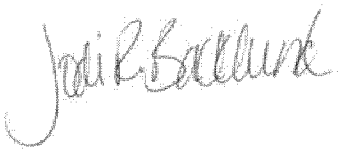
[7] Mr. Simmons's Illinois conviction was entered in 2005. Accordingly, comparison is made to the 2005 Washington statute.

CONCLUSION

Mr. Simmons's sentence must be vacated and his case remanded for resentencing.

Respectfully submitted on April 9, 2012,

BACKLUND AND MISTRY



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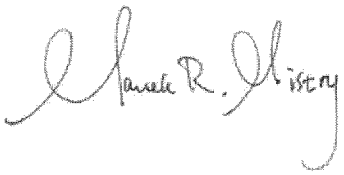

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

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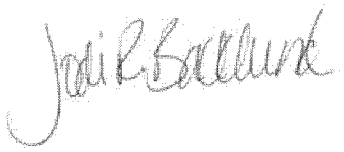

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